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No. 94-1148

Supreme Court, U.S.
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IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1994

ROBERT A. HUPPELER, EDWIN C. MAGLI and
ELLWOOD SANDMIRE,

Petitioners,

v.

OSCAR MAYER FOODS CORPORATION
Plan Administrator, and PENSION PLAN NO. 1,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF ROBERT HUPPELER, ET AL.

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ARGUMENT IN REPLY

In his Petition, Huppeler demonstrated that the decision below: (1) conflicts with decisions of this Court and those of several Courts of Appeal; and (2) raises issues of national significance which should be resolved by this Court. Huppeler will now address these principles in light of Oscar Mayer's Brief in Opposition.[1]

I. BECAUSE OSCAR MAYER CONCEDES A SPLIT IN THE CIRCUITS, AND FURTHER FAILS TO FAIRLY ADDRESS THE CONFLICT BETWEEN THE DECISION BELOW AND ALESSI, THE PETITION MUST BE GRANTED.

In his Petition, Huppeler demonstrated a split in the Circuits. See Petition, at 18-21; Compare Losada v. Golden Gate Disposal Co., 950 F.2d 1395, 1400 (9th Cir. 1991) and Reska v. Pension Plan of Bethlehem Steel, 848 F.2d 372, 375 (2d Cir. 1988) (applying correlation rule as advocated by Huppeler) with PPG Industries v. Crews, 902 F.2d 1148 (4th Cir. 1990) and Kapuscinski v. Plan Administrator, 658 F.2d 427 (6th Cir. 1981) (disregarding correlation rule as advocated by Oscar Mayer).

There are two points which Huppeler would respectfully ask the Court to note about Oscar Mayer's response. First, Oscar Mayer concedes that a split in the Circuits exists. It concedes that its position cannot be

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[1]Huppeler inadvertently omitted portions of the district court opinion from his appendix during printing. He apologizes to the Court for any confusion this may have caused. The district court opinion is set out in full in the Appendix to the Brief in Opposition by Oscar Mayer.

reconciled with the Ninth Circuit's decision in Losada. Brief in Opposition, at 9-10. By definition, therefore, Oscar Mayer concedes that this case is appropriate for this Court to hear on certiorari. Sup. Ct. R. 10.1(a) states that this Court will hear cases where "a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter...." Contrary to Oscar Mayer's implication, the language of the rule does not require a decision to conflict with multiple courts of appeal before this Court will grant a Petition. The irreconcilable conflict between Losada and the decision below, conceded by Oscar Mayer, strongly supports a decision to grant the writ.

In reality, however, the Losada decision does not stand alone. Petition, at 19, citing Reska v. Pension Plan of Bethlehem Steel Corp., 848 F.2d 372, 375 (2d Cir. 1988). Oscar Mayer argues that Huppeler "completely misrepresents" the holding of Reska. Brief in Opposition, at 9. Huppeler must respectfully disagree, and will let the language of the case speak for itself. In Reska, the Court specifically considered the correlation rule, i.e., that integration was proper "only when such benefits 'correspond[ed] to benefits available under the pension plan....'" Reska, 848 F.2d at 374 (editing in original), quoting Alessi v. Raybestos-Manhattan, 451 U.S. 504, 520, 101 S. Ct. 1895, 1904, 68 L. Ed. 2d 402 (1981). The Second Circuit then went on to apply the correlation rule by considering whether the worker's compensation award was for permanent "bodily impairment" or "wage replacement" pursuant to New York law. Reska, 848 F.2d at 375. Application of the correlation rule to determine whether an award is for permanent bodily impairment or wage replacement is the correct result, and is the position Huppeler has taken throughout this litigation. Oscar Mayer fails to deal with this language in Reska in its Brief in Opposition, for the obvious reason that the Court's discussion of the nature of the award is fatal to its position in this case. If Oscar Mayer's position that all worker's

compensation awards can be offset regardless of character is really "settled law" as it contends (Brief in Opposition, at 15) why does the Second Circuit consider the nature of the award? Oscar Mayer does not say, and by its silence concedes that Reska (like Losada) applied the correlation rule.[2] Thus, contrary to Oscar Mayer's contention, both the Ninth and Second Circuits have applied the correlation rule. As the Seventh Circuit recognized, "[t]he courts of appeals have divided in figuring out what emerges from Alessi." Pet. App. 113.

In his Petition, Huppeler also noted that decision below conflicts with this Court's decision in Alessi. Petition, at 18. Specifically, this Court approved the correlation rule in Alessi when it noted that the benefits being offset "must correspond to benefits available under the pension plan." Alessi, 451 U.S. at 520, 101 S. Ct. at 1904 (emphasis added). This Court held that medical expenses or fixed sums for bodily impairment could not be offset "because such payments do not match up with any benefits available under a pension plan qualified under the Internal Revenue Code and ERISA." Alessi, 451 U.S. at 520-521, 101 S. Ct. at 1904-05 (emphasis added).

Oscar Mayer simply asserts that "[s]ince this case presents no conflict with prior Supreme Court precedent, it is not an appropriate case for this Court's exercise of discretionary jurisdiction." Brief in Opposition, at 9. What it means, with all due respect, is that if the above-quoted

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[2]The fact that, after applying the correlation rule, the Reska court concluded that the offset was appropriate is irrelevant to this Petition. Reska, 848 F.2d at 375. Once the Petition is granted and this Court directly sanctions the correlation rule, it may be on remand that the district court will similarly find the nature of the award at issue in this case to be in the nature of wage replacement, but first this Court must determine the proper initial legal inquiry.

holdings in Alessi are ignored, it can read the case to hold that all offsets of whatever kind are sanctioned. Nowhere does Oscar Mayer deal with the above-quoted language, however, and the holdings of this Court cannot be ignored under the guise of interpretation. As the Seventh Circuit itself noted, "....some of the Court's reasoning [in Alessi] suggested that the [offset] determination might turn on the nature of the workers' compensation award." Pet. App. 105. The Seventh Circuit again stated that "there is some language... in the Supreme Court's opinion in Alessi" which was inconsistent with its final result. Pet. App. 120. Clearly, therefore, the Seventh Circuit's decision "conflict with applicable decisions of this Court." Sup. Ct. R. 10.1(c).

II. BECAUSE OSCAR MAYER CLEARLY FAILS IN ITS EFFORT TO MINIMIZE THE NATIONAL SIGNIFICANCE OF THE ISSUE IN DISPUTE, THE PETITION MUST BE GRANTED.

In his Petition, Huppeler demonstrated that: (1) the decision below would leave permanently injured employees without a remedy, creating a problem national in scope; and (2) once this Court applies the correlation rule and reverses the decision below, it should further resolve whether the character of the worker's compensation award is to be determined with reference to federal common law or applicable state law. Petition, at 21-27.

Oscar Mayer does not even attempt to challenge the fact that the decision below leaves permanently injured employees such as Huppeler with "no remedy." Pet. App. 120. It instead chooses to assert that, while the result below might have devastating consequences on individual employees, it does not raise an issue of national importance. Oscar Mayer asserts that offsets in this case could occur only pursuant to defined benefit plans, and that such plans are in

decline and therefore no longer of national significance. Brief in Opposition, at 13-14.

In fact, however, as of 1988 some 146,000 employees continued to participate in defined benefit plans. Retirement Policy: Reports of Defined Benefit Plan Decline Have Been Exaggerated, [Department of Labor] Official Says, 19 BNA Pension Reporter 994 (June 15, 1992). Further, "[m]ost large employers continue to offer a traditional defined pension plan to their employees," according to a study of over 1,000 major employers, including Fortune 100 and 500 Industrials and Fortune 500 service companies. Retiree Benefits: Most Large Firms Continue to Offer Defined Benefit Plans, 21 BNA Pension Reporter (March 7, 1994). These and other sources demonstrate that defined benefit plans continue to be of national significance. See Plan Administration: Recent Events, Trends Signal Comeback for Defined Benefit Plans, 19 BNA Pension Reporter 1974 (Nov. 2, 1992). The issue of offsets of worker's compensation for permanent partial injuries by such plans has resulted in litigation across the country since this Court's decision in Alessi. See Losada, PPG Industries, Kapuscinski, and Reska, supra. Clearly both the broad usage of the plans, and the prevalence of litigation across the nation since Alessi, demonstrate that the issue is one of national importance. This Court should resolve this national issue, particularly given that it is uncontested that permanently injured employees are being left without a remedy as the law now stands.[3]

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[3]Huppeler can deal with certain other assertions more briefly. Oscar Mayer contends that Huppeler has a remedy before the IRS which makes this Court's review unnecessary. Brief in Opposition, at 14-15. It is true that the IRS can and sometimes does declare plans to be non-qualifying under the Internal Revenue Code. See Wisconsin Nipple and Fabricating Corp. v Commissioner, 581 F.2d 1235 (7th Cir. 1978). Nothing in that case indicates, however, that a determination that the plan was non-qualifying would require Oscar Mayer to pay Huppeler the benefits it owes him. See also 26 C.F.R. § 601.201

Secondly, in the event that this Court applies the correlation rule, it should determine whether federal common law or applicable state law determines the character of the award. Petition, at 26-27, comparing Losada, 950 F.2d at 400, and Reska, 848 F.2d at 375 (state law cases) with the Seventh Circuit's decision below. See Pet. App. 116, at n.6 (indicating federal common law will be applied). Oscar Mayer bluntly asserts that this Court will reach this issue only if "this Court first decides to overrule Alessi." Brief in Opposition, at 12. With all due respect, Oscar Mayer badly overstates its case. No one, including Huppeler, is contending that Alessi should be overruled. Huppeler recognizes that fact that this Court held, as a general matter, in Alessi that the practice of integration of worker's compensation benefits was acceptable. The question to be determined is whether this holding, consistent with the correlation rule, applies only to awards in the nature of wage replacement or whether it extends to all worker's compensation awards. Contrary to Oscar Mayer's assertion, nothing in this inquiry requires that Alessi be overruled. If this fundamental issue is resolved in Huppeler's favor, this Court should finish the job by resolving whether the character of the award is determined with reference to state or federal law.

(1994) (no provision for repayment of benefits). Thus, sending Huppeler to the IRS would leave him without a remedy, contrary to Oscar Mayer's assertions.

CONCLUSION

In this reply brief, Huppeler has demonstrated that the decision below: (1) conflicts with decisions of this Court and those of several Courts of Appeal; and (2) raises issues of national significance which should be resolved by this Court.

Dated: February 14, 1995.

Respectfully submitted,

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